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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1201

MOBIL OIL CORPORATION
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICUS CURIAE,* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee has been denied as the Appellee intends to oppose jurisdiction.

The National Association of Manufacturers (NAM) is a non-profit voluntary business association incorporated under the laws of the State of New York. The NAM has a membership of approximately 12,400 manufacturing and related business concerns representing an estimated 78% of all employees engaged in manufacturing nationwide. Further, of the member companies, a significant percentage have foreign subsidiaries and operations which provide foreign source income.

This case presents an opportunity for the Court to determine the narrow issue regarding the taxability for state income tax purposes of Appellant's, Mobil Oil Corporation (Mobil), dividend income derived from Appellant's ownership of the capital stock of foreign subsidiaries, totally disassociated from the company's retail activities within the taxing state. The resolution of this question is imperative when this issue is placed in the context of other states which apportion tax liability. Appellant is not challenging the authority of Vermont to tax their intrastate or interstate activities, nor is this a challenge to the theory of apportionment employed by the State of Vermont. Rather, this case presents a challenge to the inclusion of specific foreign source dividends. The Court has never addressed this specific concept which has broad ramifications.

The NAM represents the interests of many companies similar to Appellant, which are located in the forty-six states which have a state corporate income tax. NAM is critically concerned with the issue presented in this case which questions whether this foreign source dividend income can be included in the apportionable tax base for state income tax purposes. A substantial number of our members could be adversely affected if this decision is affirmed, particularly in the event other states choose to include unrelated foreign source dividends in their apportionment formulas. The inclusion of these dividends

in the tax base constitutes an exercise of taxing authority in violation of the Due Process and Commerce Clauses of the Constitution.

Based upon the diverse membership base of the NAM, it is our belief that our filing a brief as *amicus curiae* will offer a broadened perspective in the ultimate determination of this appeal.

Accordingly, the NAM urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

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OPINIONS BELOW

The Determination of the Commissioner of Taxes of the State of Vermont dated April 11, 1974, is Appendix "A" to Appellant's Jurisdictional Statement, (State-

ment). Appendix "B" of the Statement is the January 6, 1977, unreported opinion of the Washington County Superior Court. The opinion of the Supreme Court of Vermont from which the Appeal was taken has not yet been reported, however, the opinion is Appendix "C" to the Appellant's Jurisdictional Statement.

INTERESTS OF AMICUS CURIAE

The interests of the National Association of Manufacturers (NAM) are set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae.*

SUMMARY OF ARGUMENT

During the years 1970, 1971, and 1972, Mobil Oil Corporation (Mobil), a New York corporation, was engaged in interstate and foreign commerce. During these years Mobil paid Vermont corporate income tax based upon a three factor formula, the tax base of which was derived from Mobil's retail activity within the State. In 1972 the Vermont Commissioner of Taxes assessed a deficiency predicated on a violation of the applicable taxing statute which was interpreted to create a tax base inclusive of monies received as dividend income from foreign sources, namely subsidiaries of Mobil. Mobil had excluded these dividends from their taxable income.[1]

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[1] Appellant's Jurisdictional Statement, Appendix "C", Opinion of Vermont Supreme Court, p.1 where the Court interprets the state tax law as it applies to the tax base. "The statute applies the misleading term 'Vermont net income' to the income base against which the tax is assessed. The term might seem to indicate that the tax base is composed only of income allocable to business activities within the state, when in fact the term refers to a corporation's total net income before any allocation." The opinion recognizes, that from the face of the statute, Mobil's computation would have been reasonable and accurate.

Originally Mobil appealed the Commissioner's decision in the Washington County Superior Court. Mobil successfully challenged the Commissioner's Determination, alleging that only the state of commercial domicile can tax the foreign source dividends. The Court ruled that the tax as it applied was violative of the Commerce Clause of the United States Constitution in that it violated the prohibition against multiple taxation contained in that clause.

On appeal to the Vermont Supreme Court, the decision was reversed. The Court determined on appeal that the only question presented was whether Vermont's application of its apportioned net income tax formula to the investment income in question constituted multiple taxation prohibited by the Commerce Clause. The Court determined that based on prior case law this type of tax had already been sanctioned and there was no showing of multiple taxation offensive to the Constitution.

The Commerce Clause of the Constitution prohibits multiple taxation of interstate commerce and encourages the free flow of foreign commerce in our enterprise system. There is precedent which favors the state of commercial domicile as the appropriate jurisdiction for the allocation for the taxing of foreign source investment income.

It is settled that the state has the authority to tax a concern which carries on business within its borders based upon an apportioned tax formula given the requisite nexus between the state and the business activities.

> Net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same.

Northwestern States Portland Cement Co. v. Minnesota 358 US 450, 452 (1959).

In the case at bar, the Appellant has demonstrated that the requisite nexus between the state and these monies in question does not exist. Hence, inclusion of these funds in the Vermont tax base is violative of the Due Process Clause of the Constitution.

The recent decision of the United States Supreme Court in *Moorman Manufacturing Co. v. Bair*, ____U.S. ____, 46 U.S.L.W. 4703, (June 15, 1978) is not dispositive of the situation presented in this case. In *Moorman*, the Court declined to rule on the Iowa method of apportionment. In the instant case, Appellant acknowledges the validity of the apportionment formula. The challenge before this Court goes to the precise question of whether specific dividends from foreign sources should be included in the tax base.

Should the Court rule favorably on the ability of a state to include foreign source dividend income in the tax base for allocation, the requisite nexus for inclusion must be present. In this instance the existence of retail outlets for sale of Mobil's products in the State of Vermont does not satisfy this requirement.

ARGUMENT

THE COMMERCE CLAUSE PROHIBITS INTERFERENCE IN FOREIGN COMMERCE, WHICH INCLUDES THE PROHIBITION OF MULTIPLE TAXATION

Art. I §8, Cl. 3 of the United States Constitution provides, "The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes."

Initially, the instant case raises the issue as to the extent of a State's authority over foreign commerce, whether Congress in its wisdom has deigned to enact controlling legislation or not. It is basically a national policy question which by reference to Constitutional language appears to be within the province of the Congress.[2] In *National Belias Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760 (1967) the Court reasoned that, "the very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."

In *Boston Stock Exchange v. State Tax Commissioner* 429 U.S. 318, 328 (1977) the opinion states, "It is now established beyond dispute that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States." Thus, this case provides an opportunity to establish the limits of a state's ability to burden foreign commerce without a valid basis for such an action. Historically, any conflict with multiple taxation of foreign source income has been resolved by allocating the income to the state of commercial domicile. There have been lower courts which have sustained allocation rather than apportionment.[3] In the opinion of the Vermont Supreme Court the argument is raised as to whether credence should be given to these cases, as two of

[2] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 456 (1958).

[3] Chestnut Securities Co. v. Oklahoma Tax Comission, 125 F. 2d 571 (10th Cir., 1942), cert, denied, 316 U.S. 668 (1942; Southern Pacific Company v. McColgan, 68 Cal. App.2d 48, 156 P. 2d 81 (1945); United Gas Corporation v. Fontenot, 241 La. 488, 129 So. 2d 748 (1961); Pacific Telephone and Telegraph Company v. Franchise Tax Board, 102 Cal. Reptr. 782, 498 P. 2d 1030 (1972).

the cases cited by Mobil were decided thirty years ago, the Commerce Clause was mentioned in only one of the cases, and the subject statutes were different from the apportionment issue presented in this case.[4]

These are not compelling arguments. The fact that a decision is over thirty years old does not render it any less controlling absent a reversal, superceding legislation, or Constitutional mandate. The cases provide an analagous situation upon which an argument can be based, despite direct reference to the Commerce Clause. It is the taxation concept, not the tax computation or formula which makes the differing tax statutes comparable. Indeed, at the end of the Vermont Court's opinion the Court states, "Congress or the United States Supreme Court may ultimately have to decide on the power of the states to tax on such a basis, but neither has done so yet."[5] This statement favors this appeal as recognized by the Vermont Supreme Court.

Absent this defined approach, a multinational company could be constantly subjected to multiple taxation by varied state formulas. This presents a substantial federal question in view of the prohibition against multiple taxation.

In this case, the Vermont Supreme Court has taken an unwarranted approach to their inclusion of the foreign source income in their tax formula. They claim that there was no actual showing of multiple taxation by another state, hence there is no prohibition to their taxing these funds.[6] This is inappropriate in light of express Constitutional prohibitions against double or multiple tax-

[4] Appellant's Jurisdictional Statement, Appendix "C", pp. 23a-23b.

[5] Ibid., p. 24a.

[6] Ibid., 23a.

ation as interpreted by case law.[7] The nexus or link is the only justification for imposition of a tax on interstate business. In the case at bar, the state where the dividends were received and controlled would be the allocable taxing jurisdiction. This is the state where any services or values attributable to these monies were provided. The fact that the jurisdiction with a requisite nexus has not taxed these monies, does not eliminate the protection from double taxation when another state attempts to apportion the income. This is the protection the Constitution extends.

Further, there is no *quid pro quo* to the requirement that foreign source dividends be included in the state apportionment formulas. The State of Vermont has no exemptions or credits on any taxes heretofore paid on these funds. Indeed, the federal government allows a deduction of certain dividends, (I.R.C. § 243) and creditability for foreign taxes paid, (I.R.C. §§ 901-902). The state taxation of foreign source income offers another federal policy consideration.

> The new issue raised by state taxation of foreign income is whether this tax base should be reserved to the Federal government. It might be argued that to the extent foreign source income is taxed at all, it should be taxed for the benefit of all the people of the United States and not for the benefit of a particular state. The income is earned abroad and does not depend upon, or benefit from, state protection or expenditures.[8]

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[7] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[8] Carlson, "State Taxation of Corporate Income From Foreign Sources", Essays in International Taxation: 1976, Department of the Treasury, Washington, D.C. (1976), p. 254.

A Court sanction of this inclusion in state apportionment formulas could have vast consequences where potentially all states could require the monies to be included in their tax base without a consequential relationship between the income and the tax. This is an untenable threat of multiple taxation which is entirely contrary to the Commerce Clause, and thus presents a substantial federal question suitable for this Court's review.

INCLUSION OF FOREIGN SOURCE DIVIDENDS IN THE TAX BASE OF A STATE WITHOUT THE REQUISITE NEXUS, VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Amendment XIV, § 1 of the United States Constitution is as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." On this authority the states are prohibited from indiscriminately taxing interstate commerce. In *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954), the Court refers to a "consistent adherence to one time honored concept: that due process requires some definite link, some minimal connection, between a state and the person, property, or transaction it seeks to tax." In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967), the Court recognizes that the "simple but controlling question is whether the state has given anything for which it can ask return."

In taxing any property it is imperative that the state establish this requisite link and cannot claim taxing authority based upon some self-serving formula.

> The taxation of property not located in the taxing state is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the

> taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise to "project the taxing power of the state plainly beyond its borders."

Norfolk & Western RR Co. v. Missouri Tax Commissioner, 390 U.S. 317, 325 (1968):

Indeed, Mobil has acknowledged a tax due to Vermont and has complied with the three factor formula applied to domestic income to correctly reflect that amount of income allocable to the business activity from Mobil's retail stations in Vermont. The salient factor, however, is that Mobil excluded the foreign source dividends from the formula to reach the tax base for Vermont taxing purposes. The monies received by Mobil from foreign sources bear no relationship to the State of Vermont. The monies were generated outside of the continental United States; they were received and controlled in a sister state, and there is no connection between the retail business in Vermont and the foreign income. Obviously, the Appellee has gone beyond recognized interstate taxing practices as determined by the Due Process Clause by the exercise of dominion over these dividends without even a tangential relationship with the State.

The nature of Appellant's business requires retail outlets for the sale of petroleum products in the various states. Further, the corporation has foreign subsidiaries and investments. However, the latter are not related to the domestic business of petroleum sales. At no time was any of the dividend income within the State of Vermont. These activities were carried on outside the State of Vermont and are far beyond the scope of Vermont taxing authority. Mobil has paid its fair share of allocable tax to Vermont, and there is no basis for an extra-territorrial taxation of these funds by Vermont.

MOORMAN v. BAIR IS DISTINGUISHABLE

The argument is raised that the recent decision in *Moorman Manufacturing Co. v. Bair*, ____U.S.____, 46 U.S.L.W. 4703 (June 15, 1978) is dispositive of the instant case. The two cases are clearly distinguishable. The challenge in *Moorman* concerned the single factor formula used by the State of Iowa in apportioning the tax liabilities of businesses engaged in interstate commerce. Appellant does not challenge the Vermont apportionment formula. Rather the issue is whether a specific portion of the monies which constitute Appellant's net income for apportionment are justifiably excludable from Vermont's apportionment computation. This issue is beyond the scope of *Moorman* in that the funds at issue are dividends from foreign sources. These are not monies from businesses in Mobil's domestic operations which were accurately reflected in the apportionable tax base of Vermont's formula. These funds were dividends from foreign subsidiaries. They were received, controlled, and administered in another state and have no relationship to the domestic operations. Further, these dividends are a product of foreign commerce to which Congress has given deference in the form of federal foreign tax credits. Appellant can deduct 85% of its dividend income under I.R.C. § 243. The State of Vermont allows no such deductions.

Thus, these circumstances exceed the parameters of the *Moorman* decision. The facts present crucial questions of the application of the Foreign Commerce Clause, Due Process, and the prohibition of double taxation. The question is a specific inquiry as to whether a state, and in this case the State of Vermont, can tax foreign source dividends without a sufficient nexus to bring the funds within the taxing jurisdiction.

Admittedly the *Moorman* decision recognizes that no apportionment formula can guarantee that there is not a margin of multiple taxation. This is distinguishable as the Appellant believes these monies are excludable and should not be included in the tax base, notwithstanding the potential for multiple taxation on the balance, due to disparate apportionment formulas among the states. This concept is more critically important when, as in the case at bar, the state cannot establish under any color of right a sufficient link to constitutionally sanction its inclusion of these dividends in an apportionment formula for state tax purposes.

USE OF *MOORMAN* RATIONALE PRECLUDES THE INCLUSION OF THE FUNDS IN THE STATE APPORTIONMENT FORMULA

In addition to Appellant's contention that the decision in *Moorman* does not extend to the instant case, there is language in that opinion which would under any circumstances exclude these monies. The opinion cites the decision in *Norfolk & Western Railroad Co. v. Missouri*, 390 U.S. 317, 325 (1958) wherein the Court makes clear that there must be "values connected with the taxing state" before the Court will sanction taxing authority. Further, in the *Moorman* opinion the reasoning is as follows:

> [S]tates have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by "clear and cogent evidence" that the income attributable to the State is in fact "out of all appropriate proportion to the business transacted . . . in that state."

Moorman v. Bair, ____U.S.____ (1978), 46 U.S.L.W. 4703, 4705 (June 15, 1978).

To reiterate the above discussion, these funds were dividends from foreign sources. Dominion and control of the monies were entirely in another state. The State of Vermont, by allowing Mobil to retail its products in the State, has offered no service or value that could by any reasoning reach these monies. The Appellant would be beyond the taxing authority of Vermont even by application of the decision in *Moorman*.

CONCLUSION

It is respectfully submitted that this case presents substantial federal questions concerning the Constitutional prohibition against interference in foreign commerce and the guarantee against multiple taxation. Further, there is a violation of the Due Process Clause by the taxation of foreign source dividends without the Constitutionally required nexus. There is no Supreme Court decision which is dispositive of this case. Based on the foregoing arguments there are jurisdictional grounds for the appeal before this Court.